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No. 94-1611

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1994

HAITIAN REFUGEE CENTER, INC., ET AL., PETITIONERS

v.

WARREN CHRISTOPHER, SECRETARY OF STATE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

PAUL BENDER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
MICHAEL JAY SINGER
MICHAEL S. RAAB
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

31pp

QUESTIONS PRESENTED

1. Whether the Attorney General was required to parole into the United States unaccompanied Haitian minors on the United States Naval Base at Guantanamo Bay, Cuba, to the same extent that unaccompanied Cuban minors on the Naval Base were granted parole.

2. Whether petitioner Haitian Refugee Center, Inc., and its counsel have a First Amendment right to obtain access to the United States Naval Base at Guantanamo to meet with Haitian migrants.

3. Whether the federal government is constitutionally required to provide to petitioner Haitian Refugee Center a list of the names of all Haitian migrants on the United States Naval Base at Guantanamo.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	22
Appendix	1a

TABLE OF AUTHORITIES

Cases:

Brown v. *Palmer*, 944 F.2d 732 (10th Cir. 1991)	19
Calder v. *IRS*, 890 F.2d 781 (5th Cir. 1989)	21
Capital Cities Media, Inc. v. *Chester*, 797 F.2d 1164 (3d Cir. 1986)	21
Cornelius v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788 (1985)	19, 20
County of Los Angeles v. *Davis*, 440 U.S. 625 (1979)	15
Dorr v. *United States*, 195 U.S. 138 (1904)	17
Fiallo v. *Bell*, 430 U.S. 787 (1977)	9
Flower v. *United States*, 407 U.S. 197 (1972)	19
Greer v. *Spock*, 424 U.S. 828 (1976)	19
Gregg v. *Barrett*, 771 F.2d 539 (D.C. Cir. 1985)	21
Haitian Ctrs. Council, Inc. v. *McNary*, 969 F.2d 1326 (2d Cir. 1992), vacated as moot *sub nom. Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993)	15, 17
Haitian Ctrs. Council, Inc. v. *Sale*, 823 F. Supp. 1028 (1993), vacated (E.D.N.Y. Feb. 22, 1994)	14
Haitian Refugee Ctr., Inc. v. *Baker*, 953 F.2d 1498 (11th Cir.), cert. denied, 502 U.S. 1122 (1992)	7, 14
Harisiades v. *Shaughnessy*, 342 U.S. 580 (1952)	9
Houchins v. *KQED, Inc.*, 438 U.S. 1 (1978)	8, 21
Huerta v. *United States*, 548 F.2d 343 (Ct. Cl.), cert. denied, 434 U.S. 828 (1977)	14

Cases—Continued: Page

Jean v. *Nelson*:
727 F.2d 957 (11th Cir. 1984), aff'd, 472 U.S. 846 (1985) 6, 7, 8, 9, 12
472 U.S. 846 (1985) 8, 9, 10, 11
Jimenez v. *The Tuna Vessel "Granada"*, 652 F.2d 415 (5th Cir. 1981) 17
Johnson v. *Eisentrager*, 339 U.S. 763 (1950) 7, 13
Jones v. *North Carolina Prisoners' Labor Union, Inc.*, 433 U.S. 119 (1977) 20-21
Kleindienst v. *Mandel*, 408 U.S. 753 (1972) 21
Korematsu v. *United States*, 323 U.S. 214 (1944) .. 13
Mathews v. *Diaz*, 426 U.S. 67 (1976) 9
Narenji v. *Civiletti*, 617 F.2d 745 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980) 9
O'Connor v. *Donaldson*, 422 U.S. 563 (1975) 15
Perry Educ. Ass'n v. *Perry Local Educators' Ass'n*, 460 U.S. 37 (1983) 19, 20
Ralpho v. *Bell*, 569 F.2d 607 (D.C. Cir. 1977) 17, 18
Sale v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549 (1993) 5, 9, 15
Senate of California v. *Mosbacher*, 968 F.2d 974 (9th Cir. 1992) 21
Shaughnessy v. *United States ex rel. Mezei*, 345 U.S. 206 (1953) 13
Thornburgh v. *Abbott*, 490 U.S. 401 (1989) 21
United States v. *Albertini*, 472 U.S. 675 (1985) 19
United States v. *Kokinda*, 497 U.S. 720 (1990) 19
United States v. *Lee*, 906 F.2d 117 (4th Cir. 1990) .. 14
United States v. *Rogers*, 388 F. Supp. 298 (E.D. Va. 1975) 14
United States v. *Verdugo-Urquidez*, 494 U.S. 259 (1990) 7, 13, 17
United States ex rel. Knauff v. *Shaughnessy*, 338 U.S. 537 (1950) 13
Virginia State Bd. of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) 21

Constitution, treaties, statutes and regulations: Page

U.S. Const.:
Amend. I 4, 7, 18, 19
Amend. IV 7, 14
Amend. V 5, 7, 8, 13, 17
Due Process Clause 5, 6, 8, 13, 14, 15
Just Compensation Clause 14
Panama Canal Treaty of 1977, 33 U.S.T. 39 18
Protocol Relating to the Status of Refugees, Jan. 31, 1967, 19 U.S.T. 6223, 606 U.N.T.S. 267 4
United Nations Convention Relating to the Status of Refugees, July 28, 1951, 19 U.S.T. 6259, 189 U.N.T.S. 150:
Art. 33, 19 U.S.T. 6276, 189 U.N.T.S. 176 ..... 4, 5, 15, 17
Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 9
Immigration Act of 1990, Pub. L. No. 101-649, 104 Stat. 4978:
§ 103, 104 Stat. 4985 9
§ 134, 104 Stat. 5001 9
Immigration and Nationality Act, 8 U.S.C. 1101 *et seq.*:
§ 208(a), 8 U.S.C. 1158(a) 5
§ 212, 8 U.S.C. 1182 6
§ 212(d)(5)(A), 8 U.S.C. 1182(d)(5)(A) 10
§ 243(h), 8 U.S.C. 1253(h) 4, 5, 15, 17
Refugee Act of 1980, Pub. L. No. 96-212, 94 Stat. 102 10
Soviet Scientists Immigration Act of 1992, Pub. L. No. 102-509, 106 Stat. 3316 9
Uniform Code of Military Justice, 10 U.S.C. 877 *et seq.* 13
18 U.S.C. 7 13
Exec. Order No. 8749, 3 C.F.R. 209 (1941 Supp.) 19
8 C.F.R.:
Section 204.10 9
Section 212.1 9

Regulations—Continued: Page

Section 212.5 9
Section 212.5(a) 10
Sections 212.12-212.13 9-10
Section 235.3 10
22 C.F.R. 43.15(b) 10
32 C.F.R. Pt. 761 19

Miscellaneous:

Agreement Between the United States of America and the Republic of Cuba for the Lease (Subject to Terms to be Agreed Upon by the Two Governments) to the United States of Lands in Cuba for Coaling and Naval Stations (Feb. 23, 1903) .. 16
6 C. Bevans, *Treaties and Other International Agreements of the United States of America: 1776-1949* (1971) 16
H.R. Rep. No. 608, 96th Cong., 1st Sess. (1979) 10

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 43 F.3d 1412. The orders of the district court (Pet. App. 32a-33a, 34a-36a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 18, 1995. The petition for a writ of certiorari was filed on March 31, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).[1]

[1] Petitioners state (Pet. 1) that the court of appeals issued its mandate "forthwith." In fact, the mandate was issued on April 27, 1995. At the time that petitioners filed the petition

STATEMENT

1. a. This case concerns Haitian and Cuban migrants located on the United States Naval Base at Guantanamo Bay, Cuba. Petitioners are a legal services organization, Haitian Refugee Center, Inc. (HRC), and several Haitian migrants located at Guantanamo. During the period that Haiti was controlled by the leaders of a military coup, thousands of Haitians took to the waters in unsafe boats. 94-5231 & 94-5234 C.A. Record Excerpts (R.E.) 158, ¶ 3. In order to save the migrants while deterring illegal immigration to this country, the United States brought more than 16,800 Haitian migrants to the Naval Base at Guantanamo. R.E. 175, ¶ 3. President Aristide, Haiti's democratically elected leader, has since been reinstalled, and a more stable and secure environment is taking root in Haiti. See R.E. 158-159, ¶¶ 4-10. Because of the dramatic change in circumstances in Haiti, virtually all of the Haitians have been returned to Haiti from Guantanamo.

b. Of the more than 6,000 Haitians at Guantanamo when this lawsuit began, we are informed by the Department of State that 362 Haitians remain. Of those remaining, 165 are unaccompanied minors (*i.e.*, 17 years old or younger). The minors are being cared for at Guantanamo by the Office of Immigration and Refugee Affairs in the Community Relations Service, a component of the Department of

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for a writ of certiorari, a suggestion for rehearing en banc (treated under the circuit rules as a request for both panel and en banc rehearing) filed by other parties to this litigation was pending before the Eleventh Circuit. The court of appeals denied rehearing and rehearing en banc on April 18, 1995. See App., *infra*, 1a-2a.

Justice. The care includes supervision, schooling, and recreational and athletic activities. See R.E. 179, ¶ 22; R.E. 165-166, ¶¶ 8-9.

We have been informed by the State Department that the procedures for determining where the unaccompanied minor Haitian children will be sent (now that the vast majority of the other Haitian migrants at Guantanamo have been returned to Haiti) are as follows: The United Nations High Commissioner for Refugees (UNHCR) is conducting a case-by-case evaluation to determine where each unaccompanied minor should be placed permanently, based on a judgment of what is in the best interests of each child. The minors are interviewed by a child protection expert employed by the UNHCR in order to obtain, *inter alia*, information concerning the whereabouts of the minor's parents and the nature of the individual's home life. That information is transmitted to a private relief organization—either the International Committee of the Red Cross or the Save the Children Foundation—which then searches for the minor's parents or guardians and examines the circumstances of the minor's home. The results of that inquiry are reported to UNHCR officials at Guantanamo, and a UNHCR child protection expert then decides whether it would be appropriate to return the minor to Haiti. The State Department has informed us that, by the end of June 1995, UNHCR evaluations should be completed for a substantial majority of the unaccompanied Haitian minors.

2. This lawsuit began on October 24, 1994, as an action by migrant Cubans located on the United States Naval Base at Guantanamo Bay, and by several Cuban legal service organizations. On October 31, 1994, petitioners sought to intervene in the law-

suit. They requested a bar on repatriation of the Haitian migrants and an order mandating that HRC be afforded access to them. Their complaint alleged, *inter alia*, that (1) the failure of the migrants to receive independent legal advice was in effect coercing them to return to Haiti, in violation of Section 243(h) of the Immigration and Nationality Act, 8 U.S.C. 1253(h), and Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, R.E. 48-49, ¶¶ 78-81;[2] (2) the government had violated the First Amendment rights of HRC by denying it access to the Haitian migrants, R.E. 46-47, ¶¶ 68-70; and (3) Haitian migrants were being unlawfully subjected to less favorable treatment than Cuban migrants at Guantanamo, R.E. 50-51, ¶¶ 89-91; R.E. 52, ¶ 100. Petitioners requested an order requiring the Attorney General to "parole" into the United States the unaccompanied Haitian minors. See R.E. 50-51, ¶¶ 89-91; R.E. 59. They contended that the Attorney General's practice of paroling Cubans, but not Haitians, violated the Haitians' equal protection rights. R.E. 50-51, ¶¶ 89-91.

The district court provisionally granted petitioners intervenor status on November 2, 1994. R.E. 92. On November 22, the court issued an order that, *inter alia*, required respondents to "provide unaccompanied Haitian minors equal protection and allow them parole in the same manner allowed for unaccompanied Cuban minors" and to "release the names of

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[2] The United States adheres to Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6276, 189 U.N.T.S. 176, by virtue of the related Protocol Relating to the Status of Refugees. The United States acceded to the Protocol on November 1, 1968. 19 U.S.T. 6223, 606 U.N.T.S. 267.

all Haitian detainees at Guantanamo Bay to HRC." Pet. App. 33a. The order further required the government to grant counsel for HRC "reasonable and meaningful" access to all named Haitian migrants and any other Haitian requesting counsel. *Ibid.*[3]

3. The court of appeals dissolved the district court's preliminary injunctions and remanded with directions to dismiss petitioners' claims. Pet. App. 28a. The court held that the Naval Base at Guantanamo Bay is not located in United States territory (*id.* at 16a), and that "any statutory or constitutional claim made by the * * * individual Haitian migrants must be based upon an extraterritorial application of that statute or constitutional provision" (*id.* at 17a). Based on its own precedents and on this Court's decision in *Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2557-2558 (1993), the court of appeals held that the provisions of law on which petitioners relied—8 U.S.C. 1158(a) and 1253(h), and Article 33 of the United Nations Convention Relating to the Status of Refugees—do not have extraterritorial effect, and that petitioners' claims under those provisions were therefore "untenable." Pet. App. 18a-19a.

The court of appeals also rejected the individual Haitian and Cuban migrants' contention that the

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[3] On November 23, the government filed a motion in the district court requesting the court to vacate its injunctive order or, in the alternative, to stay its order pending appeal. On November 28, the district court granted a stay pending appeal of the portions of the November 22 order pertaining to the parole of Haitian minors and the release of a list of the Haitians at Guantanamo. Pet. App. 35a-36a. But the court refused to stay its access order, and it otherwise denied the motion to vacate. *Ibid.*

Due Process Clause of the Fifth Amendment afforded them a "right to obtain and communicate with legal counsel of their choice regarding asylum application or parole in order to protect an interest against being wrongly repatriated from safe haven." Pet. App. 20a. The court held that the migrants lacked a constitutionally protected liberty or property interest in avoiding repatriation and therefore "may not rest a claim of right of counsel and information on the due process clause." *Id.* at 21a.

The court also rejected the argument that the unaccompanied Haitian minors at Guantanamo were entitled to be granted parole on the same basis as the unaccompanied Cuban minors. The court first concluded that the Attorney General had not abused her statutory authority to grant parole under 8 U.S.C. 1182, stating that "there is little question that the Executive has the power to draw distinctions among aliens based on nationality." Pet. App. 22a (quoting *Jean* v. *Nelson*, 727 F.2d 957, 978 n.30 (11th Cir. 1984) (en banc), aff'd, 472 U.S. 846 (1985)). In this case, the court noted, "the Attorney General has exercised her discretion on the legitimate basis of the very different political climates in Haiti, under the newly restored democratic President Jean-Bertrand Aristide on the one hand, and in Cuba, under the regime of Fidel Castro on the other." Pet. App. 22a.

The court of appeals also concluded that the unaccompanied Haitian minors could not invoke the equal protection component of the Due Process Clause. The court relied on an earlier Eleventh Circuit decision holding that "unadmitted and excludable aliens 'cannot claim equal protection rights under the Fifth Amendment, even with regard to challenging the

Executive's exercise of its parole discretion.' " Pet. App. 23a (quoting *Jean* v. *Nelson*, 727 F.2d at 970). The court of appeals relied as well on decisions of this Court declining to give extraterritorial effect to the Fourth and Fifth Amendments. Pet. App. 24a (citing, *inter alia*, *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 274-275 (1990); *Johnson* v. *Eisentrager*, 339 U.S. 763, 784 (1950)).

The court of appeals next held that HRC lacked a First Amendment right to obtain access to the Haitian migrants at Guantanamo. Pet. App. 25a. While recognizing that lawyers have "a narrow First Amendment right to associate for the purpose of engaging in litigation as a form of political expression," the court stated that "[t]his right is predicated upon the existence of an underlying legal claim that may be asserted by the potential litigant." *Ibid.* (quoting *Haitian Refugee Ctr., Inc.* v. *Baker*, 953 F.2d 1498, 1513 (11th Cir.) (per curiam), cert. denied, 502 U.S. 1122 (1992)). Having rejected the Haitian migrants' underlying statutory and constitutional arguments, the court rejected HRC's First Amendment claims. Pet. App. 25a.

The court further noted that it "need not determine whether the government engaged in any viewpoint-based discrimination in denying * * * HRC access while granting humanitarian organizations access." Pet. App. 25a. The court observed, however, that "[p]roviding humanitarian organizations access to the migrants does not, without more, create a First Amendment right to that access for those humanitarian organizations or for * * * HRC." *Id.* at 25a-26a. The court concluded that "[i]f the First Amendment does not apply to the migrants or to the lawyers at Guantanamo Bay, the government cannot

be engaging in impermissible viewpoint-based discrimination by restricting association between the migrants and counsel." *Id.* at 26a. Finally, the court of appeals denied HRC's request for disclosure of the identities of the Haitian migrants at Guantanamo, explaining that there is no constitutional obligation to provide private parties with access to government information. *Id.* at 27a (citing *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 9, 14 (1978) (opinion of Burger, C.J.)).

ARGUMENT

The Eleventh Circuit correctly rejected petitioners' claims, and its ruling does not conflict with any decision of this Court or of any other court of appeals. Further review therefore is not warranted.

1. Petitioners' principal claim is that the Immigration and Nationality Act (INA) and the equal protection component of the Fifth Amendment's Due Process Clause prohibit federal officials from establishing different criteria for the parole of Cuban and Haitian migrants. That argument is without merit.

a. Petitioners contend (Pet. 13-15) that this Court's decision in *Jean* v. *Nelson*, 472 U.S. 846 (1985), bars the government from paroling Cuban minors into the United States without according the same treatment to Haitian minors. That argument lacks merit. In *Jean*, a group of excludable Haitians who had reached our shores and were detained in Florida challenged the government's refusal to release them on parole. The court of appeals rejected the challenge on the ground that the equal protection component of the Due Process Clause does not apply to excludable aliens. 727 F.2d 957, 963-975 (11th

Cir. 1984) (en banc). This Court affirmed on alternative grounds, determining that it need not reach the constitutional issue because the government had represented that the regulation at issue, 8 C.F.R. 212.5, did not permit low-level INS officials to consider race or national origin in determining eligibility for parole. 472 U.S. at 855-857.

This Court did not hold in *Jean* that the United States generally was barred from making parole decisions on the basis of the nationality of the aliens concerned. Such a holding would have represented a stark departure from past practice—reflecting the close nexus between the Nation's foreign relations and its policies concerning aliens and immigration, see *Harisiades* v. *Shaughnessy*, 342 U.S. 580, 588-589 (1952); *Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 2549, 2567 (1993) (*Sale I*)—of basing certain immigration decisions in part on the identity or character of the country of which the alien is a national. See *Jean*, 727 F.2d at 978 n.30; *Narenji* v. *Civiletti*, 617 F.2d 745, 747 (D.C. Cir. 1979), cert. denied, 446 U.S. 957 (1980); cf. *Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977); *Mathews* v. *Diaz*, 426 U.S. 67, 81-82 (1976).[4]

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[4] Numerous immigration statutes and regulations have included nationality-based distinctions. See, *e.g.*, Immigration Act of 1990, Pub. L. No. 101-649, § 103, 104 Stat. 4985 (10,000 visas available for natives of Hong Kong); *id.* § 134, 104 Stat. 5001 (special 1,000 visas for Tibetans); Soviet Scientists Immigration Act of 1992, Pub. L. No. 102-509, 106 Stat. 3316 (special admission rules for scientists from the former Soviet Union); 8 C.F.R. 204.10 (same); Act of Nov. 2, 1966, Pub. L. No. 89-732, 80 Stat. 1161 (special adjustment rules that may be applied to Cubans paroled into the United States); 8 C.F.R. 212.1 (listing differing visa and passport requirements based on nationality); 8 C.F.R. 212.12-

Rather, this Court's decision in *Jean* was premised on the particular regulatory practice at issue in that case, which precluded low-level INS officials from exercising parole authority on the basis of race or national origin with respect to excludable aliens who had already reached our Nation's shores and were being held in detention. See 472 U.S. at 850-851, 852, 853, 855, 856, 857. The parole regulation at issue, in *Jean*, 8 C.F.R. 212.5(a) (see 472 U.S. at 850, 852, 855) speaks only to the parole of aliens who have been detained, under 8 C.F.R. 235.3, at a port of entry. None of the petitioners here fits that description. The Haitian migrants in this case are outside the United States and seek to be brought to the United States and then to be paroled into the United States once they have arrived here. The broad and discretionary authority of the Attorney General under 8 U.S.C. 1182(d)(5)(A) to parole aliens for what she deems to be "emergent reasons" or for "reasons deemed strictly in the public interest" surely encompasses the authority to take into account the respective conditions in, our policies toward, or other factors concerning, the country from which a prospective parolee has emigrated. The background of the Refugee Act of 1980, in which Section 1182 (d)(5)(A) was enacted in its current form, confirms that Congress understood that the parole power had been exercised on the basis of the country of nationality of those who would be paroled. H.R. Rep. No. 608, 96th Cong., 1st Sess. 3 (1979).

212.13 (special parole rules as to Mariel Cubans); 22 C.F.R. 43.15(b) (for fiscal years 1992-1994 no less than 40% of the 40,000 visas for adversely affected states shall be furnished to natives of Ireland).

Petitioners contend (Pet. 14-15) that the government's position in this case "disregards the Government's own admitted statement of the law" purportedly made by the Solicitor General during the oral argument in *Jean*. The colloquy at issue was as follows:

> Question: You are arguing that constitutionally you would not be inhibited from discriminating against these people on whatever ground seems appropriate. But as I understand your regulations, you are also maintaining that the regulations do not constitute any kind of discrimination against these people, and . . . your agents in the field are inhibited by your own regulations from doing what you say the Constitution would permit you to do.
>
> Solicitor General: That's correct.

Jean, 472 U.S. at 855-856 (quoting Tr. of Oral Arg. 28-29). Notably, neither the question posed nor the terse answer given refers to a statute.[5] The Solicitor General was obviously referring only to existing INS

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[5] Although the majority opinion in *Jean* refers to the restrictions placed on INS by the "statute" and regulations, see 472 U.S. at 854-855, 857, an examination of the oral argument transcript and the government's merits brief filed in this Court shows that the government's position was consistent throughout. The government repeatedly stated that both Congress and the Executive could make nationality-based distinctions by statute or regulation. It nowhere suggested (let alone conceded) that the pertinent statutes barred consideration of nationality in the Attorney General's determination of eligibility for parole. Nor was this Court's disposition of *Jean* in any way dependent upon a conclusion that the Executive Branch was barred by statute from considering nationality in its parole decisions.

regulations and practice. What he clearly meant was simply that that particular regulatory practice would not permit low-level INS officials to exercise parole authority on the basis of national origin. He said nothing to depart from the government's consistent position, outlined in the government's Supreme Court merits brief in *Jean*, that, even in the context of aliens physically detained within the United States, the government could take nationality into account in the parole discretion calculus so long as the use of such a factor was supported by a rational basis. See Brief for Respondents at 52-59, *Jean* v. *Nelson*, 472 U.S. 846 (1985) (No. 84-5240). Moreover, the parole issue in *Jean* concerned excludable aliens physically detained within the United States. That case did not involve aliens abroad. For all those reasons, this Court's decision in *Jean* in no way undermines the court of appeals' decision in this case.[6]

b. Further review also is not warranted of petitioners' claim (Pet. 25-27) that providing "safe haven" for the Haitian migrants confers upon them a constitutionally protected liberty and property interest. This Court has rejected the contention that

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[6] Petitioners also argue (Pet. 16) that the court of appeals departed from its earlier en banc ruling in *Jean* v. *Nelson*, 727 F.2d at 978, and failed to determine whether there was "a facially legitimate and bona fide reason for the government's decision to deny parole." As explained above, *Jean* is distinguishable because the aliens in that case had already reached our borders. In any event, the court of appeals in this case applied the very standard adopted by the en banc court in *Jean*, concluding that the Attorney General had "exercised her discretion on the legitimate basis of the very different political climates in Haiti * * * and in Cuba." Pet. App. 22a (citing the "facially legitimate and bona fide" standard).

the Fifth Amendment applies to aliens outside the United States. See *United States* v. *Verdugo-Urquidez*, 494 U.S. 259, 269 (1990) (discussing *Johnson* v. *Eisentrager*, 339 U.S. 763 (1950)).[7] Even if the Fifth Amendment applied to migrants located outside the United States, moreover, providing safe haven to such migrants creates no protected property or liberty interests that could trigger the applicability of the Due Process Clause. Indeed, although the INA confers procedural rights on excludable aliens who have reached a port of entry, it is well established that such individuals have no due process rights in connection with their exclusion proceedings. See *Shaughnessy* v. *United States ex rel. Mezei*, 345 U.S. 206, 212 (1953); *United States ex rel. Knauff* v. *Shaughnessy*, 338 U.S. 537, 544 (1950).[8]

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[7] Because this case involves aliens located outside the United States, petitioners err in contending (Pet. 21) that the court of appeals' decision conflicts with this Court's equal protection jurisprudence. For similar reasons, petitioners' allusion (Pet. 21 n.17) to *Korematsu* v. *United States*, 323 U.S. 214 (1944), is entirely misplaced. That case involved an American citizen residing within the United States, *id.* at 215, not an alien located outside our borders.

Petitioners also contend (Pet. 17) that the decision of the court of appeals permits officials at Guantanamo to "act essentially above the law in their treatment of the detained Haitian children." That is not the case. The proscriptions in the Uniform Code of Military Justice, 10 U.S.C. 877 *et seq.*, and provisions of the United States criminal laws made applicable by 18 U.S.C. 7 protect against abuse by military and civilian personnel who assist in the care of the migrants at Guantanamo.

[8] In support of their argument that United States law applies to the Haitian migrants, petitioners cite two cases in

In support of their novel due process theory, petitioners rely (Pet. 26) upon a vacated district court ruling from the Eastern District of New York [9] and

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which United States criminal laws were applied to conduct of individuals on Guantanamo. Pet. 25 (citing *United States* v. *Lee*, 906 F.2d 117 (4th Cir. 1990); *United States* v. *Rogers*, 388 F. Supp. 298 (E.D. Va. 1975)). Those cases are inapposite. *Lee* involved the application of provisions of law that are expressly intended to have extraterritorial application. See 906 F.2d at 117 n.1. And *Rogers* was premised on the erroneous view that the lease agreement between the United States and Cuba provides for general application of United States law on Guantanamo. 388 F. Supp. at 301. Moreover, as petitioners note (Pet. 25), *Rogers* apparently involved the application of the Fourth Amendment to a U.S. citizen, not an alien.

Petitioners' reliance (Pet. 25) on *Huerta* v. *United States*, 548 F.2d 343 (Ct. Cl.), cert. denied, 434 U.S. 828 (1977), is also misplaced. The court in *Huerta* rejected on the merits a takings claim presented by a Cuban contractor with respect to governmental conduct at Guantanamo without addressing the threshold question whether the Just Compensation Clause even applied in such circumstances.

[9] *Haitian Ctrs. Council, Inc.* v. *Sale*, 823 F. Supp. 1028 (1993), vacated by Stipulated Order Approving Class Action Settlement Agreement (E.D.N.Y. Feb. 22, 1994). That vacated district court decree has no precedential force and does not warrant prolonged discussion. That decision was premised on the erroneous view that the Due Process Clause applied on Guantanamo, ignoring that Guantanamo is not part of United States territory and that this Court has held that the Due Process Clause does not apply to aliens outside the United States. See pages 12-13, *supra*, 16-17, *infra*. See also *Haitian Refugee Ctr., Inc.* v. *Baker*, 953 F.2d 1498, 1513 (11th Cir.) (per curiam) ("In the present case, the interdicted Haitians have no recognized substantive rights under the laws or Constitution of the United States."), cert. denied, 502 U.S. 1122 (1992).

the Second Circuit's decision in *Haitian Ctrs. Council, Inc.* v. *McNary*, 969 F.2d 1326, 1343 (1992), vacated as moot *sub nom. Sale* v. *Haitian Ctrs. Council, Inc.*, 113 S. Ct. 3028 (1993) (*Sale II*). As petitioners acknowledge (Pet. 24), however, the Second Circuit's ruling was vacated by this Court as moot, and it therefore has no precedential effect. See *County of Los Angeles* v. *Davis*, 440 U.S. 625, 634 n.6 (1979); *O'Connor* v. *Donaldson*, 422 U.S. 563, 578 n.12 (1975). In any event, even the Second Circuit agreed that the Due Process Clause was not triggered by the act of "transport[ing] * * * interdicted [migrants] to Guantánamo Bay." 969 F.2d at 1345. Under the Second Circuit's analysis, it was the act of "screening in" a migrant (*i.e.*, finding a colorable claim of refugee status) that rendered the Due Process Clause potentially applicable. *Ibid.*

Moreover, in finding a due process right for screened-in migrants, the Second Circuit relied on its view that Article 33 of the 1951 United Nations Convention Relating to the Status of Refugees, 19 U.S.T. 6276, 189 U.N.T.S. 176, and Section 243(h) of the INA, 8 U.S.C. 1253(h), applied to alien migrants outside of the United States. See *McNary*, 969 F.2d at 1344-1345, 1346 n.16. In the Second Circuit's view, "screening in" implicated those provisions and created a "reasonable expectation" by the screened-in migrants "in not being wrongly repatriated." *Id.* at 1345. Subsequent to the Second Circuit's decision, however, this Court held in *Sale I*, *supra*, that Section 243(h) and Article 33 do not apply outside the United States. See 113 S. Ct. at 2559-2567.

Even under the Second Circuit's reasoning, however, there would be no due process right here. No refugee determination or screening has taken place

with regard to the migrants in the present case. The fact that petitioners have been permitted to stay in "safe haven" does not create any enforceable rights or effect any legally significant change in status; it merely reflects a discretionary, humanitarian policy being carried out by the United States. See 94-5138 R.E. 257, 293-294. There is no legal entitlement to be brought to "safe haven" in Guantanamo; there is no legal entitlement to remain there; and the allowance of safe haven certainly confers no enforceable right to be brought to and paroled into the United States.

c. The court of appeals correctly held (Pet. App. 16a-17a) that the Naval Base at Guantanamo Bay is located on the sovereign territory of Cuba, not on United States territory. As the court of appeals recognized (*id.* at 2a & n.1), the Naval Base occupies that foreign land pursuant to a lease agreement with Cuba. The lease grants the United States the right to use and occupy Guantanamo and adjacent water areas. In the agreement, however, the parties explicitly recognize "the continuance of the ultimate sovereignty of the Republic of Cuba over those land and water areas." Agreement between the United States of America and the Republic of Cuba for the Lease (Subject to Terms to be Agreed Upon by the Two Governments) to the United States of Lands in Cuba for Coaling and Naval Stations, Art. II (Feb. 23, 1903); 6 C. Bevans, *Treaties and Other International Agreements of the United States of America: 1776-1949*, at 1113-1114 (1971). The court of appeals correctly concluded that the authority exercised by the United States at Guantanamo derives from that agreement, not from any claim of sovereignty.

Petitioners contend (Pet. 23-24) that the issue of the status of Guantanamo merits this Court's review

because the ruling of the Second Circuit in *McNary*, 969 F.2d at 1345, conflicts with the decision of the court of appeals in this case. As explained above, however, this Court vacated the Second Circuit's decision, and it therefore has no precedential weight. In any event, the Second Circuit did not squarely hold that aliens interdicted at sea and housed at Guantanamo had Fifth Amendment rights with respect to their efforts to enter this country. Rather, it held, in affirming the district court's entry of a preliminary injunction, that there existed "serious questions" concerning the applicability of the Fifth Amendment to Guantanamo Bay. 969 F.2d at 1344. Moreover, as pointed out above, even that limited ruling was based on the court's erroneous view (since rejected by this Court in *Sale I*) that 8 U.S.C. 1253(h) and Article 33 of the Refugee Convention applied outside the United States, and therefore created protectable interests on the part of aliens who (unlike the migrants here) had been found to have made a colorable showing of refugee status. Accordingly, further review of that issue is not warranted.[10]

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[10] Petitioners further contend (Pet. 24) that the court of appeals' decision "runs counter to" the *Insular Cases* and, in particular, a statement made by the Court in *Dorr* v. *United States*, 195 U.S. 138, 142 (1904). But the *Insular Cases* generally, and *Dorr* in particular, involved territory over which the United States was exercising "sovereign power." *United States* v. *Verdugo-Urquidez*, 494 U.S. at 268. The Court held in the *Insular Cases* that a variety of constitutional provisions do not apply even in those areas. See *ibid.* Guantanamo, however, is an area over which the United States does not exercise sovereign authority.

Petitioners' reliance (Pet. 24-25) on *Jimenez* v. *The Tuna Vessel "Granada"*, 652 F.2d 415 (5th Cir. 1981), and *Ralpho* v. *Bell*, 569 F.2d 607, 618-619 (D.C. Cir. 1977), is also mis-

2. Petitioners argue (Pet. 18) that the government impermissibly prevented HRC and the Cuban American Bar Association from exercising their asserted First Amendment rights to associate with Haitian and Cuban migrants, while other groups such as Amnesty International were permitted "wide access" to the Naval Base at Guantanamo. The court of appeals properly declined to recognize a First Amendment right of access to aliens at a military base outside the United States. Even in the domestic context, "[n]othing in the Constitution requires the Government freely to grant access to all who wish to exercise their right to free speech on every type of Government property without regard to the nature of the property or to the disruption that

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placed. *Jimenez* involved conduct of the federal district court in the former Panama Canal Zone, an area where, as a matter of Executive discretion, the United States applied numerous treaties and provisions of domestic law. (The Panama Canal Zone no longer exists. The Panama Canal Treaty of 1977, 33 U.S.T. 39, recognized the Republic of Panama's sovereignty over, and the application of Panamanian law in, the area that was formerly the Canal Zone. See Pet. App. 17a n.11.) *Ralpho* involved a challenge to action of the Micronesian Claims Commission, a federal agency covered by the Administrative Procedure Act. 569 F.2d at 616 & n.54. The case concerned a claim submitted by a citizen of Micronesia, a Trust Territory over which the United States admittedly does not exercise sovereignty. *Id.* at 619 n.71. As the court in *Ralpho* noted, however, the federal government had informed the United Nations that the United States "feels that it has a duty toward the peoples of the Trust Territory to govern them with no less consideration than it would govern any part of its sovereign territory." *Id.* at 619 n.72. The United States government has not taken any such position with respect to the migrants temporarily housed at Guantanamo.

might be caused by the speaker's activities." *Cornelius* v. *NAACP Legal Defense & Educ. Fund, Inc.*, 473 U.S. 788, 799-800 (1985). Assuming, *arguendo*, that under some circumstances access to U.S. military bases abroad might be subject to some form of First Amendment analysis, the Naval Base at Guantanamo is most assuredly not a public forum. See *Greer* v. *Spock*, 424 U.S. 828, 837-838 (1976). Apart from the rare instance where a portion of a military base is freely open to civilian traffic (see *Flower* v. *United States*, 407 U.S. 197 (1972) (per curiam)), the courts have uniformly recognized military bases to be nonpublic fora, even where they have been opened to the public for special purposes. See *United States* v. *Albertini*, 472 U.S. 675 (1985); *Brown* v. *Palmer*, 944 F.2d 732, 735-739 (10th Cir. 1991) (en banc).[11]

The government's willingness to allow limited access to the Naval Base at Guantanamo does not create a public forum. As this Court has previously recognized, the mere fact that a forum is used for some communication of ideas or information does not dedicate it as a public forum. See *Greer*, 424 U.S. at 831, 836; *Perry Educ. Ass'n* v. *Perry Local Educators' Ass'n*, 460 U.S. 37, 44-47 (1983); *United States* v. *Kokinda*, 497 U.S. 720, 730 (1990) (opinion of O'Connor, J.). Indeed, a contrary rule would provide the government with a significant disincentive for allowing *any* speech or expressive activity on government property. See *id.* at 733.

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[11] Guantanamo is unquestionably a facility to which access is carefully controlled. Both the Executive Order that established the Naval Base, and the regulations that govern its use, place stringent restrictions on civilian entry. See Exec. Order No. 8749, 3 C.F.R. 209 (1941 Supp.); 32 C.F.R. Pt. 761.

Even in the domestic context, the government may restrict speech in a nonpublic forum based upon "subject matter and speaker identity so long as the distinctions drawn are reasonable in light of the purpose served by the forum and are viewpoint neutral." *Cornelius*, 473 U.S. at 806; see also *Perry*, 460 U.S. at 46. The government has plainly satisfied that standard in this case.[12] The controlled one-on-one access to the migrants granted to Amnesty International does not support petitioners' claim of viewpoint discrimination. Amnesty International was allowed such access for the purpose of facilitating the federal government's viewpoint-neutral goal of demonstrating to the public that its operations on Guantanamo satisfy the standards of an independent, well-respected human rights organization. See Dep. of Stewart Moneymaker 23 (Nov. 22, 1994); see generally *id.* at 19-31. Similarly, a few other organizations (*e.g.*, the World Relief Organization) have been permitted to maintain a long-term presence on Guantanamo because of their ability to assist the government in caring for the migrants, as demonstrated by their experience and expertise in performing similar tasks worldwide. See R.E. 127; Dep. of Ronald W. Zaperach 53-58 (Nov. 22, 1994); Moneymaker Dep. 23-25. The government's decision to accept their assistance does not constitute impermissible viewpoint-based discrimination. See *Jones* v. *North Carolina*

[12] Petitioners erroneously contend (Pet. 19) that the government imposed a "total ban" on speech by HRC. In fact, HRC attorneys have visited Guantanamo on three separate occasions (during the periods of December 5-9, 1994, January 17-20, 1995, and February 28-March 3, 1995), and they may continue to visit the base under the reasonable access policy adopted by the government. See Pet. App. 71a-72a.

Prisoners' Labor Union, Inc., 433 U.S. 119, 134-135 (1977); *Thornburgh* v. *Abbott*, 490 U.S. 401, 415-416 & n.13 (1989).

3. Finally, further review of petitioners' claim of a constitutional right of access to a list of the Haitian migrants is not warranted. It is well established that the Constitution does not afford a right of access to information in the possession of the government. See, *e.g.*, *Houchins* v. *KQED, Inc.*, 438 U.S. 1, 14-15 (1978) (opinion of Burger, C.J.); *id.* at 16 (Stewart, J., concurring in the judgment); *Senate of California* v. *Mosbacher*, 968 F.2d 974, 978 (9th Cir. 1992); *Calder* v. *IRS*, 890 F.2d 781, 784 (5th Cir. 1989); *Capital Cities Media, Inc.* v. *Chester*, 797 F.2d 1164, 1167-1168 (3d Cir. 1986) (en banc); *Gregg* v. *Barrett*, 771 F.2d 539, 546 (D.C. Cir. 1985). Petitioners contend (Pet. 28-29) that HRC has a constitutional right to obtain a list of the Haitian migrants because "[w]here there is a willing speaker, there is a right to hear that speaker." What HRC asserts here, however, is not the right to hear a "willing speaker," but a right to obtain access to government information. Thus, the cases that they cite—*Kleindienst* v. *Mandel*, 408 U.S. 753 (1972) (rejecting challenge to Attorney General's refusal to grant nonimmigrant visa to an alien invited to participate in academic conferences and discussions in the United States), and *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (challenge to state prohibition on advertising of consumer drug prices)—are inapposite.[13]

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[13] Petitioners also erroneously state (Pet. 29) that the government is "isolating" those Haitian migrants at Guantanamo who have not yet expressed a desire to communicate with HRC or other members of the public and is thereby

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL BENDER
Acting Solicitor General *

FRANK W. HUNGER
Assistant Attorney General

MICHAEL JAY SINGER
MICHAEL S. RAAB
Attorneys

MAY 1995

"blocking the free flow of information." But the Haitian migrants have access to mail and AT&T telephone service, see Moneymaker Dep. 162-163, and they therefore have an opportunity to communicate with HRC or others outside Guantanamo if they so desire.

* The Solicitor General is disqualified in this case.

APPENDIX

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 94-5138, 94-5231, 94-5234 & 95-4043

CUBAN AMERICAN BAR ASSOCIATION, INC., CUBAN LEGAL ALLIANCE, INC., DUE PROCESS, INC., LIZBET MARTINEZ, ARIANNA GONZALEZ NOBAEZ, ARNIEL DEL CAMPO GONZALEZ, on behalf of Themselves and all others similarly situated, JOVANI MIGUEL FIFFE PINO, NESTOR RODRIGUEZ LABORI, NELSON TORRES PULIDO, MARITZA EXPOSITO, DAVID BUZZI, ALBERTO RODRIGUEZ GARCIA, on behalf of themselves and all others similarly situated, LEYDIS MILAGROS RUIZ MENDEZ, on behalf of herself and all others similarly situated, ELENA PINO, VIRGINIA PEREZ, on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLEES

HAITIAN REFUGEE CENTER, INC., GARRY JOSEPH, PAULOMME EDMOND, PIERRE ONEL ANTOINE, VOIDIEU JEAN LOUIS, BERGELINE JEAN LOUIS, PADECI JEAN LOUIS, PROVISIONAL INTERVENORS

versus

WARREN CHRISTOPHER, Secretary of State, WILLIAM J. PERRY, Secretary of Defense, DORIS MEISSNER, Commissioner, Immigration and Naturalization Service, JANET RENO, Attorney General, IMMIGRATION AND NATURALIZATION SERVICE, BRIGADIER GENERAL MICHAEL WILLIAMS, Commander Joint Task Force, DEFENDANTS-APPELLANTS

On Appeal from the United States District Court
for the Southern District of Florida

[Filed Apr. 18, 1995]

ON PETITION(S) FOR REHEARING AND
SUGGESTION(S) OF REHEARING EN BANC

Before: KRAVITCH, BIRCH and CARNES, Circuit Judges.

PER CURIAM:

(✓) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Stanley F. Birch, Jr.
United States Circuit Judge

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